Ethical Pitfalls When Seeking Past Due Payments from a Client

By Nancy L. Ripperger

Most private practice attorneys have faced the dilemma of what to do when a client fails to pay. Initiating collection actions can lead to ethical problems for the attorney if the attorney is not exceedingly careful. This article will address some of the ethical questions attorneys need to consider when seeking past due payments from clients.

Stopping Work for the Client

When a client fails to pay a bill, can an attorney ethically stop work for the client? Yes, in some instances. To understand an attorney’s responsibilities in this situation it is necessary to review two different Rules of Professional Conduct. Per Rule 4-1.3, an attorney has an obligation to represent a client diligently unless Rule 4-1.16 permits the attorney to terminate the representation.

Rule 4-1.16 is a broad-based rule that addresses both an attorney declining the initial representation of a client and terminating an existing attorney-client relationship. Rule 4-1.16 has two subsections, subsection (b)(5) and subsection (b)(6), which specifically address situations where the client fails to pay. Subsection (b)(5) provides that an attorney may withdraw from representing a client if the client fails substantially to fulfill an obligation to the lawyer such as paying fees. Subsection (b)(5) further provides that the attorney must give the client reasonable warning of his intended actions and afford the client the opportunity to pay the fees owed before ceasing work.

While subsection (b)(5) does not require that the notice be in writing, it is preferable to do so. However, an attorney cannot meet the notice requirements of (b)(5) by merely including a clause in the fee agreement stating the attorney will cease work on a matter if the client fails to pay. Missouri Informal Ethics Op. 20000172. Rather, the notice must be given after the client fails to pay.

Subsection (b)(6) also allows an attorney to withdraw if the representation will result in an unreasonable financial burden on the lawyer. It does not require that the attorney give the client reasonable warning of his intentions.

Even if subsections (b)(5) or (6) apply, a court can refuse to allow the attorney to withdraw if there is ongoing litigation. See Rule 4-1.16(c) and V.H. v. J.P.H, 815 N.E.2d 1096 (Mass. Ct. App. 2004) (court refused to let an attorney withdraw from tort action even though the client fell $35,000 behind in payments). If the court refuses to let the attorney withdraw, the attorney is obligated to proceed forward in a competent and diligent matter with the representation.
Suing the Client

If a client refuses to pay his bill, can the attorney sue the client without risking discipline? Yes, if certain conditions are met. To arrive at this conclusion, it is necessary to look at both Rules 4-1.6 and 4-1.7.

Rule 4-1.6 provides, “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, . . . or the disclosure is permitted by Rule 4-1.6(b).” This rule is much broader than the attorney-client privilege and includes “all information relating to the representation, whatever its source.” See cmt. 3 to the Rule. At first glance this Rule would appear to prevent an attorney from suing a client for past due debts. However, subsection (b)(3) of the Rule specifically allows disclosure of confidential information to establish a claim on behalf of the lawyer in a controversy between the lawyer and the client. Furthermore, Comment 9 to the Rule explains that an attorney is entitled to reveal confidential information in a suit for attorney fees. However, an attorney should not disclose any more information than is reasonably necessary for the purpose. See cmt.12 to Rule.

The second rule that comes into play is Rule 4-1.7, which addresses conflicts of interest. Rule 4-1.7 prohibits, among other things, situations where there is a significant risk that the representation of the client will be limited by the lawyer’s own interests. Because of this limitation, the attorney must withdraw from representing the client before suing the client.

The real question an attorney should ask before suing a client is whether it is wise to sue the client. A suit for fees will usually result in the client filing a complaint with disciplinary authorities and possibly bringing a malpractice action. The time spent defending either one of these actions could easily cancel out any money the attorney might recover.

Notifying a Credit Bureau

Does it violate any ethical rules if the attorney reports a client’s past due debt to a credit bureau? There is no Missouri authority on this issue but most jurisdictions that have considered the issue have found that it violates Rule 4-1.6(b). These jurisdictions reason that that reporting past due debt to a credit bureau: (1) is not necessary for establishing the lawyer’s claim for compensation, (2) risks disclosure of confidential information, and (3) suggests punishment in trying to lower the client’s credit rating. See S.C. Ethics Op. 94-11(1994), S.D. Ethics Op. 95-3 (1995), Mass. Ethics Op. 00-3 (2000); but see Fla. Ethics Op. 90-2 (1991) (ethically permissible for an attorney to report a delinquent client’s debt to a credit bureau, provided debt was not in dispute and no unrelated confidential information disclosed). Thus, to avoid a possible violation of Rule 4-1.16, an attorney should not report or threaten to report a client’s debt to a credit bureau.
Assigning or Selling the Debt to a Collection Agency

Can an attorney ethically sell or assign past due client debt to a collection agency? There is an informal Missouri ethics opinion which provides that it is permissible for an attorney to sell the debt to a collection agency, provided the attorney only provide the agency with the name of the debtor, the debtor’s last known address, the debtor’s telephone number(s), and the outstanding balance of the debt. See Mo. Informal Ethics Op. 960103.

However, an assignment of the debt, rather than the purchase of the debt, could be problematic. This is because any services provided by the collection agency must be consistent with the ethical rules that directly bind the lawyer. See Rule 4-5.3.[1] To avoid ethical violations, the attorney would need to remain informed about the efforts to collect the debt, and be able to veto activities that were inconsistent with the lawyer’s legal or ethical requirements. See Washington D.C. Ethics Op. 298 (2000). In addition, if the collection agency retains a portion of the debt it collected as payment, this would be viewed as fee sharing by the attorney and a violation of Rule 4-5.4(a).[2] Thus, an attorney should avoid assigning debt to a collection agency.

Conclusion

While an attorney may take various actions to collect money owed to him by clients, he must do so carefully to avoid ethical violations. A better approach would be to avoid the problem all together, if possible. Things that an attorney can do to avoid payment problems with clients include: (1) discussing fees and billings at the first meeting with a new client, (2) using detailed and specific written fee agreements, (3) requesting and obtaining an advance fee payment at the beginning of the representation, (4) billing periodically and consistently, and (5) keeping the client abreast of developments in the representation, especially negative developments, so the client is not shocked by the cost of the representation.

Endnotes

1 Rule 4-5.3 provides that a lawyer is responsible for the conduct of non-lawyers associated with the lawyer if the non-lawyers violate the Rules of Professional Conduct.

2 Rule 4-5.4 provides that a lawyer should not share legal fees with a non-lawyer.

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